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In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. [redacted] 190

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LOWELL MICHAEL COIL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o——o——o

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In the Supreme Court of the United States

OCTOBER TERM, 1964

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LOWELL MICHAEL COIL,
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UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o——o——o

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case of April 5, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, entered on April 5, 1965, is printed in Appendix "A" hereto, infra pp. 9-24, and is reported in —— Fed. 2d ——.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 5, 1965, and is printed in Appendix "B", page 22 infra. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). Rule 22(2).

QUESTIONS PRESENTED

Whether petitioner was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States when the trial Court allowed the Government's chief witness to testify as to a purchase of narcotics from the petitioner, and then permitted the witness to claim the Fifth Amendment privilege on cross-examination when asked about other narcotic transactions.

Whether the petitioner was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States when the trial Court refused to grant a mistrial or a continuance of his case when the Government's chief witness was permitted to testify as to the purchase of narcotics from the petitioner, and then was permitted to take the Fifth Amendment when questioned on cross-examination about the possession of narcotics because of a pending State charge against him.

Was the petitioner denied a fair trial when the Court prevented the petitioner from presenting the theory of his defense to the jury?

Were the verdicts returned inconsistent with the evidence presented?

STATEMENT

Petitioner was convicted on the first Count of a five-Count indictment, charging that he did knowingly and wilfully conceal and cover up by trick, scheme and device, a material fact, in that petitioner maintained a prescription file in which were prescriptions showing "the dispensing of 450 hypodermic tablets morphine sulfate half-grain to one Dorothy Williams, between June 13, 1963, and September 26, 1963; when, in truth and fact, as [the petitioner] well knew, no more than 120 of such tablets had been dispensed to the said Dorothy Williams. Petitioner was acquitted on Count II of the indictment, which charged generally that he maintained a false prescription file concerning the dispensing of demoral. Petitioner was acquitted on Count III of the indictment, charging that he sold morphine sulfate hypodermic tablets to the Government's chief witness, one William Michael Ruggiere, without a prescription. The remaining two Counts of the indictment were dismissed by the Government prior to the commencement of trial.

Petitioner's Motion for New Trial was overruled, and an appeal to the Court of Appeals for the Eighth Circuit was perfected.

The Court of Appeals for the Eighth Circuit affirmed the conviction on April 5, 1965, and by its Order of April 5, 1965, the judgment and sentence of the trial Court was affirmed.

The Government's chief witness, William Michael Ruggiere, testified at the trial that during the period in question, he was taking fifteen to eighteen grains of narcotics a day; and that he purchased morphine sulfate tablets from the petitioner on occasion without a prescription. He testified he

would cheat, lie and steal to get narcotics; but when asked if he had a quantity of narcotics in his possession on the date he was arrested, he was permitted by the trial Court, to take a blanket Fifth Amendment to all further questions concerning his possession or obtaining narcotics. The Government's chief witness had freely and voluntarily answered all questions concerning narcotics on direct examination, but was permitted to take the Fifth Amendment as to all questions concerning narcotics on cross-examination; and the Court thereby prevented the petitioner from showing that the Government's chief witness was stealing narcotics from the petitioner.

It was petitioner's position at the trial that the Government's chief witness was stealing narcotics from petitioner's drugstore; and he presented evidence to that effect. Petitioner intended to prove by cross-examination that the Government's chief witness was, in fact, stealing narcotics from petitioner's drugstore, and that he had stolen narcotics from other drugstores and other places in the area and had obtained narcotics by lying, cheating and stealing. It was petitioner's defense to Count I of the indictment, charging a false morphine prescription file and he proved that he had properly and legally dispensed the morphine tablets and that the Government's chief witness was stealing these morphine tablets from the prescription area of petitioner's drugstore.

Petitioner moved for a mistrial or, in the alternative, to continue his case until the charges filed by the State of Nebraska against the Government's chief witness could be tried and he would no longer have the benefit of the claimed privilege. This motion was overruled; and petitioner contends that he was denied the right to a full and fair trial; that he was prevented from presenting his defense to the jury; and that the Court should have granted a continuance

of the case or a mistrial until the charges against the Government's chief witness had been tried. Furthermore, by so ruling, the Court prevented this petitioner from presenting his theory of defense to the jury; and from testing the credibility of the Government's chief witness, which was in issue and was a matter for the jury to consider.

Petitioner contends that the verdicts returned herein are inconsistent, based upon the evidence presented, in that the Government charged that petitioner maintained a false prescription file and that he illegally sold morphine tablets to the Government's chief witness. The jury returned verdicts of acquittal as to the sale of the morphine Count and a verdict of acquittal as to the false prescription file on demoral; but found the petitioner guilty of maintaining a false prescription file as to the morphine tablets. By their verdict, the jury indicated they did not believe the Government's chief witness, that he was purchasing morphine tablets from the petitioner without a prescription; and if petitioner had been permitted to develop the theory of his defense, that the Government's chief witness was stealing morphine tablets from his drugstore, the jury would have returned a verdict of not guilty as to the false prescription file with reference to these morphine tablets. As it stands, the verdicts are inconsistent with the evidence presented, since the Government attempted to prove that the petitioner maintained a false prescription file with reference to the morphine tablets and was selling them to the Government's chief witness. The Government then attempted to prove that their chief witness was purchasing these morphine tablets from petitioner without a prescription. How can the Government contend that petitioner maintained a false prescription file and sold the subject drugs to their chief witness, when their chief witness' testimony was wholly without credibility and was not be-

lieved by the jury? The Government did not contend, nor did they attempt to prove, that petitioner was selling drugs to any other individual; and it is petitioner's position that he proved, and the evidence sustained the fact that he was not maintaining a false prescription file.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is in direct conflict with the decision of this Court in *Rogers vs. United States,* 340 U. S. 367, 373, 71 S. Ct. 438, 95 L. Ed. 344, wherein this Court held that as to each question of which a claim of privilege is directed, the Court must determine whether the answer to that particular question would subject the witness to a real danger of further crimination. This Court, in that opinion, further pointed out that disclosure of a fact waives the privilege as to details of a transaction; and if a witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of the other parties, and discloses criminal connection, he is not permitted to stop, but must go on and make full disclosure. The decision of the Court below in the instant case is, therefore, in direct conflict with *Rogers vs. United States,* supra.

In the instant case, the Court of Appeals for the Eighth Circuit affirmed the trial court's ruling that the Government's chief witness could take the blanket privilege as to all questions concerning the possession or purchase of narcotics. This Court has always held that the constitutional privilege against self-incrimination is essentially a personal one and petitioner's counsel should have been permitted to ask questions of the witness concerning his possession of narcotics, and if the particular questions would have subjected the witness to "a real danger" of further crimination, he could

at that time have invoked the privilege. Cf., *Hike v. United States,* 227 U. S. 131, 144, 33 S. Ct. 226, 58 Law Ed. 450.

2. The decision of the Court below cites this Court's opinion in *Murphy vs. Waterfront Commission of New York Harbor,* 378 U. S. 52, 84 S. Ct. 1954, 101 L. Ed. 1020, for the proposition that the Government's chief witness here was entitled under the Fifth Amendment privilege to decline to answer when his answers would incriminate him of charges under the State law. The decision of the Court below fails to consider that the Government's chief witness had already testified to alleged purchases of narcotics without a prescription and possession of narcotics, which are crimes under both the Federal Statutes and the Nebraska Statutes; and that he thereby waived his right to refuse to answer further questions which would not subject him to a "new and real danger" of further crimination, as set forth in this Court's opinion in *Rogers vs. United States,* supra.

3. Clearly, the trial Court's ruling and the decision of the Court below is erroneous in refusing to grant petitioner a mistrial or a continuance of his case until the pending State charges against the Government's chief witness were disposed of, and the Government's chief witness would then no longer be able to claim the privilege of the Fifth Amendment and would then be compelled to testify and not thereby prevent the petitioner from presenting his defense to the jury.

The decision of the Court below is also believed to be erroneous in affirming the trial Court's overruling of petitioner's motion for continuance, for the reason that the testimony sought to be elicited from the Government's chief witness went directly to his credibility and was offered to show his propensities to steal narcotics. His credibility as a

witness was an issue and was a matter for the jury to consider, as was pointed out by this Court in *Quock-ting vs. United States*, 140 U. S. 417, 420-421, 11 Sup. Ct. 733, 734, 35 L. Ed. 501.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD J. BRUCKNER,
1100 Farm Credit Building,
Omaha, Nebraska,
Counsel for Petitioner.

June 1, 1965

APPENDIX A

(Opinion Below)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,769

Lowell Michael Coil, also known as L. M. Coil, also known as Mike Coil,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Nebraska

[April 5, 1965.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

MEHAFFEY, Circuit Judge

Defendant, Lowell Michael Coil, was tried to a jury in the District Court at Omaha, Nebraska, and convicted under Count I of a five count indictment for violation of 18 U.S.C.A. § 1001. The jury found that he had knowingly concealed a material fact by maintaining a false prescription file at his pharmacy. Defendant's file reflected the dispensing of 450 one-half grain morphine sulfate tablets to Dorothy Williams between June 13, 1963 and September 26, 1963, when, in fact, no more than 120 of such tablets had been dispensed to this customer.

The defendant challenges the sufficiency of the evidence to support the verdict making appropriate a fairly extensive narration of the facts in evidence relative to Count I.

On November 1, 1962 the defendant, a pharmacist, purchased a drugstore located in Omaha, Nebraska. The purchase did not include any prescription items, and defendant obtained his first supply of morphine on June 14, 1963. On September 30, 1963, United States Narcotics Agent Cox checked the defendant's narcotic prescription files. Such an inspection necessitates a checking of the purchases of narcotics from the order copies the druggist is required to keep, the inventory of the narcotics on hand and the prescriptions on file indicating the amount dispensed to customers.

The United States official order forms revealed that defendant had purchased 600 one-half grain morphine sulfate tablets. Defendant's inventory of such tablets was 150 on the inspection date and his record prescriptions, eight in number, indicated the dispensing of 450 of the tablets to Mrs. Dorothy Williams. Thus, the records tallied and would have been accurate provided defendant had in fact dispensed the 450 tablets to Mrs. Williams.

Before Agent Cox left the premises, the defendant asked him about the inventory, admitting knowledge of a shortage of morphine. Defendant told Agent Cox that he attributed the shortage to a suspected theft by a customer, one William M. Ruggiere who was a drug addict. Defendant said that he was aware the law required him to report the shortage, but he had not done so. He explained that he had "slipped" a couple of extra prescriptions to the doctor, obtained the doctor's signature, balanced his inventory, and therefore nothing could be proven against him.

Mrs. Williams had been treated for an incurable disease by her family doctor for some two and one-half or three years. At the time we are concerned with, the doctor did not expect her to live more than a month or two. The doctor had been prescribing a milder form of narcotics, but she was in such pain in June of 1963 the doctor started prescribing one-half grain morphine sulfate tablets. He wrote the first prescription on defendant's drugstore. He told defendant that due to Mrs. Williams' condition she could have all the tablets she needed to relieve her pain. He instructed the druggist to type out the prescriptions as Mrs. Williams' need required, and mail them to him for signature and return. The doctor's suspicion was not aroused until he received large orders from the defendant on two typed prescriptions in one mail for 100 tablets and 50 tablets, respectively. The prescriptions called for Mrs. Williams to take one such tablet every four hours as needed for pain. During this time Mrs. Williams was confined to her bed at home and her husband, Robert S. Williams, was procuring her medicine from defendant. When the morphine sulfate tablets were first prescribed, Mr. Williams made his first purchase of twelve tablets on June 14, 1963. He administered the tablets orally to his wife but this method did not provide the needed relief. He discontinued using them for a while until he learned to administer the drug by hypodermic injection into the bloodstream. His next purchase on August 31, 1963 was also for twelve tablets. He continued periodically to make purchases on eight or nine occasions. Each purchase was for twelve tablets except the final purchase October 1, 1963 for thirty-six tablets. On this last occasion, which was after the narcotic agent had checked defendant's inventory on September 30, 1963, Mr. Williams intended to purchase only twelve tablets, but the defendant told him he had thirty-six on hand, to which he was entitled, and suggested that Williams take them all.

Mr. Williams kept records of his medical purchases for income tax purposes. The defendant knew this, and some time after October 9, 1963 (the date the narcotic agent picked up Mr. Williams' records) the defendant engaged Mr. Williams in conversation outside of the drugstore. Defendant asked him if he could buy his purchase records as "it might be the only evidence that could cause him (defendant) any trouble." He further stated that he would rather give Mr. Williams the money than give it to an attorney. The defendant also asked Mr. Williams how many tablets Williams had purchased from him. Williams estimated from 100 to 125.

Government witness Ruggiere lived in the neighborhood of defendant's drugstore and became acquainted with him as a customer some time around October, 1962. He visited the drugstore frequently and testified that defendant sold him one-half grain morphine sulfate tablets on a number of occasions without prescriptions for a price of $10.00 per grain. This witness testified that the largest number of one-half grain tablets he purchased from the defendant at any one time was twenty and the smallest, five. On some of these occasions, the defendant delivered him the narcotics at his home in rubber balloons, explaining narcotics users often carried drugs in rubber balloons so that in the event of apprehension the balloon may be swallowed to hide the evidence without a large quantity of narcotics being fatally dissolved in the body.

Maurene Updegraff, who was living with Ruggiere, testified that on some ten occasions she saw the defendant deliver to Ruggiere balloons containing small white pills and that on each occasion she saw Mr. Ruggiere give the defendant in excess of $50.00.

The defense attempted to establish a theft of morphine by Ruggiere, a drug addict, but the proof was apparently rejected as incredible by the jury.

In testing the evidence to determine its sufficiency, we must consider it in a light most favorable to sustaining the verdict of the jury. *Glasser v. United States,* 315 U. S. 60, 80 (1942); *McIntosh v. United States,* —— F. 2d —— (8th Cir. Feb. 24, 1965); *Valentine v. United States,* 293 F. 2d 708, 710 (8th Cir. 1961), cert. denied 369 U. S. 830 (1962); *Blumenfield v. United States,* 284 F. 2d 46, 52 (8th Cir. 1960), cert. denied 365 U. S. 812 (1961); *Bell v. United States,* 251 F. 2d 490, 491 (8th Cir. 1958); *McKenna v. United States,* 232 F. 2d 431, 435-36 (8th Cir. 1956); *Batsell v. United States,* 217 F. 2d 257, 260 (8th Cir. 1954). We are of the opinion that the evidence was amply sufficient to support the jury's verdict of guilty.

The essential ingredients of the offense are all but admitted. It is undisputed that defendant obtained on Government order blanks 600 one-half grain morphine sulfate tablets and upon the date of the inspection defendant's inventory stood at 150 tablets. The prescription file required to be kept by the Government on narcotics falsely indicated that all 450 of the missing tablets had been dispensed to Mrs. Dorothy Williams. The defendant makes the contention that he was only 130 tablets short, but his computation in arriving at such a figure is falsely premised. Defendant, in his brief, assumes that Mr. Williams administered to his wife approximately two and one-half tablets per day over a period of one hundred twenty-four days between the dates of the first prescription on June 14, 1963 and the last prescription on October 19, 1963. Williams testified, and his records indicate, that he obtained morphine tablets from the defendant on eight, nine, or at most ten occasions, and he

never bought more than twelve tablets at a time with the sole exception of his final purchase of thirty-six tablets, which took place after the critical inspection date. Williams originally purchased twelve tablets on June 14 and he made no additional purchase until August 31, so a period of seventy-seven days intervened, during which Williams could not have administered more than twelve tablets. The important aspect, however, is not the extent of defendant's shortage in number of tablets, but his keeping of false prescription records indicating that 450 of said tablets had been dispensed to Mrs. Williams when in fact no such amount had been so dispensed.

The defense of a suspected theft by Ruggiere is inconsistent with the prescription file records which indicated that all of the missing tablets had been dispensed to Mrs. Williams.

Additionally, Government witnesses Ruggiere and Updegraff testified to some ten separate purchases of one-half grain morphine sulfate tablets by Ruggiere from the defendant without a prescription during the period involved.

Defendant challenges the validity of this evidence by reason of the jury's acquittal of him on another count of the indictment charging sales to Ruggiere. We, of course, have no way of knowing whether the jury credited any part of these witnesses' testimony. Their testimony was unnecessary to a conviction on Count I. The mere fact that the jury saw fit to acquit the defendant on one count of the indictment cannot be construed as effectuating a determination of the factual issues under another count even though the same evidence is offered in support of both counts of the indictment. The Ninth Circuit observed in *Bryson v. United States,* 238 F. 2d 657, 663 (9th Cir. 1956), cert. denied, 355 U. S. 817 (1957):

> "A verdict on one count of an indictment cannot have the effect of determining factual issues under another count, even though the same evidence is offered in support of both counts. The legal sufficiency of the evidence to support each verdict must be determined without reference to the other. *Dunn v. United States*, 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356."

Ever since the Supreme Court decision in *Dunn v. United States*, cited above, this Court has ruled that inconsistency of a verdict on separate counts of an indictment does not entitle a convicted defendant to reversal of a judgment of conviction. See *Schaefer v. United States*, 265 F. 2d 750, 754-55 (8th Cir. 1959), cert. denied 361 U. S. 844 (1959), and cases therein cited.

Nevertheless, there was no inconsistency in the verdict in the instant case. The separate counts charged separate offenses, and we believe that the evidence was sufficient to justify a verdict of conviction under Count I without consideration of the testimony of either Ruggiere or Updegraff.

Defendant also asserts that proof was lacking in the failure to establish knowledge, willfulness, or, in effect, criminal intent. Since you cannot look into the mind of a person, intent must necessarily be inferred either from his acts or statements. The jury could have properly inferred *mens rea* from the defendant's actions in keeping the false prescription records. Evidence of wrongful intent is also corroborated by defendant's efforts to purchase Williams' records of purchases of narcotics from defendant in order to protect himself against prosecution or conviction, his admission to Agent Cox at the time of the latter's investigation of his narcotics stock and suspicion of a shortage of morphine, and his admission that he had "slipped" the doctor two extra prescriptions, but that he would never admit what could not be proven against him.

In his brief, defendant relies upon the case of *Mitchell v. United States*, 143 F. 2d 953 (10th Cir. 1944), but we do not read this decision as giving any support to defendant's position. The court there said in a narcotics case at page 956:

> "All the Government was required to do was to prove that the record was false. To illustrate: If the Government proved that appellant purchased 50,000 grains of morphine and that his dispensation record showed that he dispensed only 20,000 grains, it would have proved its case."

The Government made such a showing in the instant case. It proved that the defendant purchased 600 morphine tablets, had 160 on hand, and had actually legally dispensed at most only 120 of these tablets. The evidence could hardly have been more convincing, short of a confession. Since questioning the weight of the evidence, except when the testimony is incredible as a matter of law, is beyond the scope of our appellate review, we have no alternative but to hold that the evidence sustained the jury's verdict.

Defendant next asserts error on the part of the trial court in permitting Government witness Ruggiere to invoke his Fifth Amendment privilege and refuse to answer questions on cross-examination. The questions propounded were relative to two other matters wholly unrelated to Ruggiere's testimony on direct examination.

First, defendant sought to cross-examine Ruggiere respecting the details of Ruggiere's arrest on September 30, 1963 by the city police of Omaha, Nebraska. The arrest was made while the witness was an occupant of a taxicab. The query put to him by defense counsel on cross-examination was "had you put a quantity of narcotics in that cab at the

time you got in?" The witness then claimed his Fifth Amendment privilege which the trial court sustained, halting further examination into this incident. In his offer of proof, defendant asserted that the witness would have answered this question by admission of possession of narcotics which had been recently stolen from Gary's Pharmacy (another drugstore not owned by the defendant).[1]

The second occasion wherein the trial court permitted the witness to invoke his Fifth Amendment privilege stemmed from questions concerning an alleged trip made on September 19, 1963 to Norfolk, Nebraska by the wit-

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1 Mr. Lathrop: (Out of hearing of the Jury) If the Court please, I would like at this time to make an offer of proof that if the witness were required to answer he would answer that he did have in his possession at the time he entered the cab a quantity of narcotics and that he had obtained them from the front lawn at 3016 North 16th Street; that after he picked the box of narcotics up, he dusted it off and got in the taxicab and that he was arrested sometime later still in the cab; that these drugs were recently stolen from Gary's Pharmacy on South 13th.

"I feel this is essential cross-examination in view of our defense that these drugs were stolen from Mike Coil, and I am entitled to show that this man not only is capable of being a drug thief but is one, and if he refuses to answer, which I guess is his privilege, we are not afforded a full, fair and complete cross-examnation.

"(Offer read to the Court out of the hearing of the Jury)

"By the Court: I think I have given you great latitude. Are you objecting to the offer?

"Mr. Richling: We are objecting to the offer, yes.

"By the Court: Sustained.

"Mr. Richling: For the reason that counsel for defendant had laying in front of him what is obviously an Omaha Police Court record, and from this evidence that is displayed here, the proof of his facts set forth in his offer are obtainable from other sources.

"By the Court: The objection is sustained.

"Mr. Lathrop: Do I understand, then that the witness has claimed the privilege of the Fifth Amendment concerning any of this transaction in the taxicab and that I am not to go into it?

"By the Court: That is my understanding.

"Mr. Lathrop: All right, sir." (Tr. 109-110)

ness with two other drug addicts, and that while there the witness by lying, fabricating and feigning an illness induced a doctor to give him a prescription by which he obtained narcotics. The offer of proof of this second instance also shows that the testimony sought was not germane to the subject matter of the witness' direct testimony but was offered for the purpose of going to the witness' credibility.

The purpose to be served by the attempted cross-examination was to impeach the witness' credibility by showing that he would steal, burglarize or lie to obtain narcotics during a withdrawal period following a bout with the drug. Counsel had earlier elicited these self-same admissions from the witness.[2]

---

2 "Q. Well, you would steal to get them, wouldn't you?
"A. Yes.
"Q. You would cheat to get narcotics, wouldn't you?
"A. Well, I would answer yes.
"Q. There is scarcely anything you wouldn't do in order to obtain narcotics?
"A. There are quite a few things I wouldn't do.
"Q. Well, you would steal, wouldn't you? You have admitted that.
'A. Yes, I would steal.
"Q. And lie?
"A. What do you mean? To whom?
"Q. To anybody who would enable you to get narcotics.
"A. I wouldn't be sitting here lying for narcotics.
"Q. I am not suggesting that. But you acknowledge that you would steal to get narcotics?
"A. Yes.
"Q. You would burglarize to get them, wouldn't you?
"A. Right.
"Q. If you would do that, you would lie to get them, wouldn't you?
"A. As I said, to whom?
"Q. Well, to anyone who might be able to supply them to you or write out a prescription for you? You would lie to them.
"A. To a doctor to try to obtain narcotics?
"Q. Yes.
"A. If I was sick?
"Q. Yes.
"A. Yes." (Tr. 98-99)

The record indicates that the witness was under state charges based upon both the taxicab and the Norfolk, Nebraska incidents. To require him to answer defendant's questions on cross-examination would have been tantamount to forcing him to confess to two separate crimes unrelated to the subject matter of the direct testimony. This is the very evil the Fifth Amendment protects against.

Even without regard to the Fifth Amendment privilege against self-incrimination, a trial court necessarily has a great discretion on the subject of limiting cross-examination. It is only in a case of clear abuse of such discretion—one that results in obvious prejudice—that a reviewing court should interfere. Here, the testimony sought to be elicited would have been cumulative by reason of the previous general admissions of the witness which did not go so far as to link him with any particular crime. The Fifth Amendment privilege against self-incrimination protects against an answer that would furnish even a link in the chain of evidence needed to prosecute. The Supreme Court so stated in *Hoffman v. United States,* 341 U. S. 479, 486-87 (1951):

> "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Accord: *Malloy v. Hogan,* 378 U. S. 1, 11-12 (1964).

And the Supreme Court has also ruled that so long as a witness has not incriminated himself by what he has al-

ready answered, he may claim the privilege at any time. *McCarthy v. Arndstein,* 262 U. S. 355 (1923), aff'd on reh. 266 U. S. 34 (1924).

Defendant asserts that by reason of the witness' direct testimony respecting purchases of morphine tablets from the defendant, he waived his Fifth Amendment privilege. We do not agree. The witness' testimony in chief even if an admission of guilt for one crime has no relation to the other matters in which the trial court sustained the witness' right to invoke his privilege respecting separate, distinct and unrelated crimes. The Second Circuit in passing on this question adversely to defendant's contention here held in *United States v. Cardillo,* 316 F. 2d 606, 611 (2nd Cir. 1963), cert. denied 375 U. S. 822 (1963):

> "The district Court was not in error in refusing to strike [witness'] testimony. After admitting to a substantial criminal record, [witness] invoked the privilege against self-incrimination when asked whether he committed other crimes in the past and whether he was guilty of certain crimes with which he was then charged in the state courts. These questions were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination. Since the trial court was aware of his substantial criminal record and the pendency of other criminal actions against him, the defendants were not prejudiced by [witness'] assertion of the privilege and, therefore, there was no need to strike his testimony."

As to whether the direct testimony of a witness invoking the privilege during cross-examination may be used against the defendant, the rule is that the testimony can be so used in cases where the cross-examination went only to collateral matters which bear on the credibility of the witness. See *United States v. Cardillo, supra,* at 611.

Following *Cardillo, supra,* this Court also noted the exception to the rule that requires striking of a witness' testimony when the cross-examination of a witness is unduly restricted. See *Smith v. United States,* 331 F. 2d 265 (8th Cir. 1964), cert. denied —— U. S. —— (19—).

The charges pending against the witness, Ruggiere, concerning which he refused to answer questions were state charges. At the time of the *Cardillo* decision, there was some doubt as to whether a witness was entitled under the Fifth Amendment privilege to decline to answer when his answer would only incriminate him of charges under a state law. Such doubt has now been dispelled in favor of the witness by the Supreme Court in the recent case of *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U. S. 52 (1964).

The witness here did not waive his Fifth Amendment privilege. The testimony sought to be elicited and rejected by the trial court concerned collateral matters going only to the witness' credibility. The evidence sought by the cross-examination was cumulative on this issue, and its exclusion was not prejudicial to defendant. The trial court properly ruled that the witness was within his rights in invoking his Fifth Amendment privilege and correctly refused to strike any of the witness' direct testimony.

The judgment of conviction is affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment Below)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,769. September Term, 1964

Lowell Michael Coil, also known as L. M. Coil, also known as Mike Coil,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Nebraska

This cause came on to be heard on the record from the United States District Court for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Lowell Michael Coil, also known as L. M. Coil, also known as Mike Coil, do surrender himself to the custody of the United States Marshal for the District of Nebraska, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

April 5, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 190

LOWELL MICHAEL COIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 9–21) is reported at 343 F. 2d 573.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 22) was entered on April 5, 1965. On April 28, 1965, Mr. Justice White granted an extension of time to and including June 4, 1965 within which to file a petition for a writ of certiorari. The petition was filed on May 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

778-691—65

QUESTIONS PRESENTED

1. Whether petitioner's conviction for maintaining a false morphine prescription file was unsupported by the evidence or was inconsistent with his acquittal on the companion charge of selling morphine without a prescription.

2. Whether it was error to permit a witness, who had testified that he had purchased morphine tablets from petitioner without a prescription, to invoke his privilege against self-incrimination when cross-examined concerning other unrelated narcotics transactions.

STATEMENT

Petitioner, a pharmacist, was convicted, after trial by jury, of violating 18 U.S.C. 1001 by maintaining a prescription file at his pharmacy which falsely reflected the dispensing of 450 one-half grain morphine sulfate tablets to one Dorothy Williams between June 13 and September 26, 1963, when, in fact, no more than 120 of such tablets had been dispensed to that customer. He was acquitted on two counts charging, respectively, the maintenance of a false prescription file concerning the dispensing of demoral, and the sale without a prescription of morphine sulfate tablets to one William Michael Ruggiere.[1]

The evidence showed that prior to September 30, 1963, petitioner had ordered 600 half-grain morphine sulphate tablets (Tr. 6-7),[2] that on September 30, he had a physical inventory of 150 tablets on hand (Tr.

[1] Two additional counts were dismissed by the government prior to trial.

[2] "Tr." refers to the trial transcript.

10), and that his prescription file reflected the dispensing of 450 tablets to Mrs. Williams (Tr. 9). Because she was suffering from a painful and incurable disease, Mrs. Williams' physician had authorized petitioner to dispense the tablets to her as needed and then to send him the prescriptions for his signature (Tr. 38). Mrs. Williams' husband, testifying from records which he kept for tax purposes, stated that he had made eight or nine purchases from petitioner of twelve tablets each prior to September 30 and one purchase of thirty-six tablets on October 1 (Tr. 49–50).

When interviewed by a narcotics agent on September 30, petitioner said that he was short of morphine because it had been stolen from him by Ruggiere. He acknowledged that he was required by law to report the shortage and admitted that he had not done so. He said that he had tricked Mrs. Williams' doctor into unwittingly signing extra prescriptions (Tr. 27). Because his inventory balanced, he said, the agent could prove nothing (*ibid.*), and he further stated that since the agent could not prove what he had done to cover the shortage he would claim it was a lie if the agent ever made an issue of it (Tr. 31–32).

Ruggiere testified that he was addicted to morphine (Tr. 73) and that he had purchased half-grain tablets of the narcotic from petitioner without a prescription (Tr. 84) on several occasions for ten dollars a grain (Tr. 80–81). On cross-examination, he admitted that, if necessary, he would steal, cheat or lie in order to obtain morphine (Tr. 98–99). He further admitted that he had been arrested on Septem-

ber 30 by local police who had found a quantity of narcotics in the taxi in which he was riding (Tr. 105–107). He asserted his privilege against self-incrimination when asked if he had put the narcotics there, and the claim of privilege was sustained on the ground that State charges based upon that arrest were still pending against him (Tr. 108). He also asserted his privilege when asked whether certain other persons were narcotics users and whether he had taken a trip with them (Tr. 111), and that claim was also upheld since the trip was the subject of State charges pending against him (Tr. 116). Petitioner made an offer of proof that the narcotics found in the taxi were stolen from a pharmacy. This evidence, he contended, would prove that Ruggiere was not merely capable of being, but was in fact, a narcotics thief (Tr. 109–110). Petitioner also offered to prove that on the trip as to which Ruggiere asserted his privilege, he had feigned illness in order to obtain a narcotics prescription from a doctor. This evidence, petitioner contended, would demonstrate the extent to which the witness would go to obtain narcotics (Tr. 112). On this basis, petitioner claimed either that he should be given the right to interrogate the witness as to these trasactions, or that the witness' entire direct testimony should be stricken (Tr. 114–116). The requests were denied.

ARGUMENT

1. There was adequate evidence (pp. 2–3, *supra*) to sustain a conviction of petitioner for maintaining a false prescription file with respect to morphine pur-

portedly dispensed to Mrs. Williams. Nor was his conviction on this count inconsistent with his acquittal on the charge of dispensing morphine to Ruggiere without a prescription. Maintaining a false file to conceal a shortage of narcotics is an independent offense, regardless of the cause which occasioned the shortage. Even had the jury believed that Ruggiere stole the morphine from petitioner, it could have convicted him of maintaining the false file. In any event, inconsistency in a jury verdict is not a ground for reversal. *Dunn* v. *United States*, 284 U.S. 390; *United States* v. *Dotterweich*, 320 U.S. 277, 279.

2. There is no merit to the claim that Ruggiere's cross-examination was improperly curtailed. The witness' direct testimony constituted an admission by Ruggiere that he had obtained narcotics from petitioner without a prescription, but it did not deprive him of his right to assert his privilege against self-incrimination with respect to other unrelated transactions not involving petitioner. See *Hoffman* v. *United States*, 341 U.S. 479; *McCarthy* v. *Arndstein*, 262 U.S. 355. Since cross-examination was sought upon matters collateral to the witness' direct testimony, permitting him to invoke the privilege did not require the court to strike his testimony. *United States* v. *Cardillo*, 316 F. 2d 606, 611 (C.A. 2), certiorari denied, 375 U.S. 822. In any event, Ruggiere's testimony was apparently discredited by the jury since it acquitted petitioner on the charge which turned upon his story.[3]

[3] Contrary to the assumption of the court of appeals (Pet. App. A 13), the defense of a theft of morphine by Ruggiere

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1965.

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was not "apparently rejected as incredible by the jury." Rather, the jury had sufficient doubt concerning Ruggiere's credibility to acquit petitioner on the charge of selling narcotics to him without a prescription.

U.S. GOVERNMENT PRINTING OFFICE : 1965